PUBLIC PROSECUTOR

v.

RAJAPPAN CHINNA KOUNDER

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CRIMINAL REFERENCE NO. 2 OF 1985]
4 JULY 1985

CRIMINAL LAW AND PROCEDURE: *Section 7 of Law Reform (Marriage and Divorce) Act 1976 - Offence of bigamy under s. 494 of Penal Code - Bigamous marriage contracted outside Malaysia.*

ADMINISTRATIVE LAW: *Jurisdiction of Magistrate's Court - Act committed extra-territorially - Section 76 of Subordinate Courts Act 1948.*

The respondent, a Malaysian permanent resident, married his first wife in India in 1947. In 1954, he and his wife together with their children came to live in Malaysia. In March 1984, the respondent whilst still being married to the first wife went to India for a visit and whilst there married another woman and brought her to Malaysia two months later. In August 1984 the respondent was charged in the Magistrate's Court at Klang for the offence of bigamy under s. 494 of the Penal Code. The Deputy Public Prosecutor submitted that the learned Magistrate refused to hear the case on the ground that she had no jurisdiction to do so. The Public Prosecutor applied under s. 127(c) of the Criminal Procedure Code to the High Court to determine whether the Magistrate's Court had jurisdiction to hear the case. The learned Judge held that the Courts have no jurisdiction to try proceedings for bigamy committed outside Malaysia. The learned Judge also held that it is not an offence if the second marriage takes place outside Malaysia. Certain questions of law were then referred to the Supreme Court for determination.

Held:

[1] Whether a bigamous marriage contracted outside Malaysia is an offence under s. 494 of the Penal Code.

Per Salleh Abas LP:

> The question as to whether or not contracting such bigamous marriage is an offence is thus purely a question of construction of these statutory provisions, bearing in mind that "all crimes are local" unless it is intended by Parliament to be extra-territorial, i.e. having effect outside the territory of the legislature ... we are only concerned here with the criminal consequences of a bigamous marriage contracted abroad by a person to whom the Act applies. I cannot find any words in the sections of LRA which could carry an implication that such marriage is punishable as an offence of bigamy under s. 494 of the PC. ... Every piece of legislation is presumed to have effect only within the territory of the legislature ... I am of the view that a bigamous marriage, contracted abroad by a Malaysian citizen or a permanent resident notwithstanding such marriage is in contravention of s. 5(1) of the LRA, is not an offence punishable under s. 494 of the PC.

Per Hashim Yeop Sani SCJ:

> ... it cannot be said that the intention (if there was such an intention) of the legislature to cover a second marriage contracted outside Malaysia has been expressed clearly in the statute. An offence simply means an act or omission of such a description as would if committed within Malaysia be punishable under the law of Malaysia. What we have is a clear provision in the Penal Code that except for Chapter VI the other offences in the Penal Code are **not** extra-territorial offences.

[2] If the answer to question (a) is in the affirmative then whether or not in law a Magistrate's Court has jurisdiction to try such person for an offence punishable under s. 494 of the Penal Code.

Per Salleh Abas LP:

> Under no circumstances could the Magistrate's Court, Klang and for that matter any other Magistrate's Court in this country take cognizance of an offence committed beyond its respective territorial limit ... Not only has the Magistrate's Court no jurisdiction to try the offence ... our High Court too has no jurisdiction ... The seemingly wide jurisdiction given to the High Court under s. 22(1)(b)(iii) of the Courts of Judicature Act to try a Malaysian citizen or permanent resident in respect of an offence committed in any place without and beyond Malaysia, is limited only to trial of offences under Chapter VI of PC, those under the Extra-Territorial Offences Act, and those certified by the Attorney-General to be security offences.

Per Abdul Hamid CJ Malaya:

> ... the Act must be construed, on its true construction, to apply only to an act of bigamy committed within the limits of Malaysia unless there are stated in the Act express words to show that it is the intention of the legislature to make justiciable acts of bigamy committed outside the limits of Malaysia. There seems to be no such express provision in the Act ... Basically the question that emerges is only one of jurisdiction, i.e. which Court can try the offence if it is committed extra-territorial? ... In my view sub-section (2) of s. 76 of the Subordinate Courts Act 1948 makes it clear that the jurisdiction of the Magistrate's Court is limited to a cause or matter arising within the local limits of jurisdiction except where it is expressly provided otherwise by written law.

Cases referred to:

MacLeod v. A.G. of New South Wales [1891] AC 455
Earl of Russell's case [1901] AC 446
R.v. Hilaire [1903] 3 NSW State Rep 228
P.P. v. Nai Prasit [1961] 27 MLJ 62
Regina v. Martin & Ors. [1956] 2 QB 272
London and North Eastern Ry. Co. v. Berriman [1946] AC 313
Tuck & Sons v. Priester [1887] 19 QBD 629

Legislation referred to:

Criminal Code 1892 [Canada], s. 275(1)
Civil Aviation Act 1949, s. 62 [UK]
Courts of Judicature Act 1964, ss. 22(1), (a), (b), 66
Criminal Procedure Code, ss. 9, (a), 127(c), 188
Criminal Law Amendment Act 1883, s. 54
Dangerous Drugs Regulations 1953 [UK], reg. 3
Extra-Territorial Offences Act 1976, s. 2
Indian Criminal Procedure Code, s. 188
Penal Code [Ind], ss. 4, 188
Interpretation Act 1967, s. 4(1)
Law Reform (Marriage and Divorce) Act 1976, ss. 3, 5, 5(1), 6, (2), 7
Offences Against the Person Act 1861 [UK], s. 57

Penal Code, s. 494
Prevention of Corruption Act 1961, s. 27
Subordinate Courts Act 1948, ss. 76, (1), (2)

Other sources referred to:
The Conflict of Laws, Dicey and Morris, 9th Edn. p. 70
S.S. Lotus [1927] Series A, No. 10, 2 WCR, p. 20

For the applicant/public prosecutor - Mohd. Noor Ahmad (DPP)
For the respondent - M. Satchiananda; M/s. Satchi & Co.

JUDGMENT

Salleh Abas LP:

In this reference we were required to answer the following two questions:

(a) whether or not in law a person who is domiciled in Malaysia and marries again during the lifetime of his or her husband or wife at a place outside Malaysia and thereafter returns to Malaysia with the second spouse has committed an offence punishable under s. 494 of the Penal Code (FMS Cap. 45);

and

(b) if the answer to question (a) is in the affirmative then whether or not in law a Magistrate's Court has jurisdiction to try such person for an offence punishable under s. 494 of the Penal Code (FMS Cap. 45).

The facts which gave rise to the reference were these. The respondent, who is a Malaysian permanent resident, (presumably therefore having a Malaysian domicile) married his first wife in India in 1947. In 1954 he and his wife together with their children came to live in Malaysia. In March 1984 the respondent whilst still being married to the said first wife went to India for a visit and whilst there married another woman. In the following May he brought the second wife to Malaysia and has since then lived together with her in Klang.

For this second marriage he was charged with an offence of bigamy under s. 494 of the Penal Code (PC), but the Magistrate, Klang before whom the respondent was indicted declined to hear the case holding that she had no jurisdiction. On a subsequent reference to the High Court under s. 127(c) of the Criminal Procedure Code (CPC), N.H. Chan J held that not only did the Magistrate have no jurisdiction, the charge itself disclosed no offence because the bigamous marriage had taken place outside Malaysia. The Public Prosecutor, not satisfied with the ruling referred the matter for our opinion under s. 66 of the Courts of Judicature Act (CJA), contending that despite the fact that the bigamous marriage was committed outside Malaysia; it being in contravention of s. 5(1) of the Law Reform (Marriage and Divorce) Act 1976 (LRA) it is punishable under s. 494 of the PC and that the Magistrate, Klang had therefore the necessary jurisdiction to hear the charge against the respondent.

The Court heard the reference at its sitting on 4 July 1985 and gave negative answers to both the questions and now as promised here is my full reason therefore.

I have had the advantage of reading the draft judgment of the Chief Justice. He only dealt with the issue of jurisdiction as he thought that the issue as to whether the respondent's second marriage was an offence or not raised in the first question is not relevant. With respect, I beg to differ. I am of the opinion that both the questions are relevant as the issues raised therein are tied up in one main question - i.e. whether a bigamous marriage contracted abroad by a person coming under the purview of LRA is an offence under s. 494 of the PC. Now I deal with these two questions as follows:

Question (a) -Whether a bigamous marriage contracted outside Malaysia in contravention of s. 5 of the LRA by virtue of s. 7 is an offence under s. 494 of the PC.

The *actus reus* in this case, i.e. the second marriage took place in India. The question as to whether or not contracting such bigamous marriage is an offence is thus purely a question of construction of these statutory provisions, bearing in mind that "all crimes are local" unless it is intended by Parliament to be extra-territorial, i.e. having effect outside the territory of the legislature. (See Lord Halsbury LC in *MacLeod v. A.G. of New South Wales.*[1891 AC 455 at 458.)

To start with I reproduce herewith s. 494 of the PC:

> Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

The person who comes within the scope of the section is clearly one whose personal law allows him only a monogamous marriage. Muslims, Hindus and others whose personal law allows them a polygamous marriage or even polyandry are therefore excluded from the scope of this section. This restriction is achieved by the use of the phrase:

> in a case in which such marriage is void by reason of its taking place during the life of such husband or wife.

However, since the passing of the LRA, Hindus and others are now no longer excluded from the operation of s. 494 of the PC. Section 3 of LRA declares that the Act applies to all persons in Malaysia and to all persons with Malaysian domicile though resident abroad (Muslims excepted). Section 5 prohibits the person to whom the Act applies from taking a second wife or husband if the existing marriage still subsists and under s. 6 a marriage in contravention of s. 5 shall be void and under s. 7 such marriage is deemed to be an offence of bigamy punishable under s. 494 of the PC.

The offence of bigamy must have been envisaged by the colonial power as a measure to safeguard and strengthen the institution of monogamous marriage, which is part of its ethics. When introduced to a colonial territory it was never meant to apply to those whose personal law allows them more than one wife or husband; otherwise many colonial territories, especially India, whose population consists of people of diverse races, religions and customs would have become ungovernable. It was intended, it seems, to apply to citizens of the colonial power itself and those who partook of its ethics and value.

The next question is this: Is bigamy under s. 494 of the PC extra-territorial in effect? The answer to this question is purely a matter of construction of the section of the Code, but it is interesting to observe how the Courts in other Commonwealth countries construed the statutes dealing with this offence.

In the UK the offence was held to be extra-territorial because s. 57 of the Offences Against the Person Act 1861 say:

> whosoever being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or **elsewhere**, shall be guilty of felony.

In *Earl of Russell's* case [1901] AC 446 the Earl's second marriage which took place in America came within the meaning of the marriage taking place **"elsewhere"** and so he was forced to plead guilty to the indictment.

In Australia, the offence was held to be local. Section 54 of the Criminal Law Amendment Act 1883 of the New South Wales provides:

> whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude of seven years.

In *MacLeod v. A.G. of New South Wales* (*supra*) the Privy Council held that the word "whosoever" means "whosoever is amenable" to the jurisdiction to the Colony of New South Wales, and that "wheresoever" means "wheresoever in the Colony" the offence is committed. Thus, the offence was held to be local only. This decision was followed by the Supreme Court of the New South Wales in *R v. Hilaire.* [1901] 3 NSW State Rep 228.

In Canada, s. 275(1) of the Canadian Criminal Code 1892 defines bigamy as:

> the act of a person who being married goes through a form of marriage with any other person **in any part of the world.**

The wide scope of this provision is restricted by sub-section (4) which makes an extra-territorial bigamous marriage an offence only if it is contracted by a British subject resident in Canada and leaving Canada with intention to go through such form of marriage. The exact words of sub-section (4) are these -

> No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves with intent to go through such form of marriage.

(See *Re Bigamy sections of Code* [1897], 27 SC R 461 Canada).

It would appear that if a Canadian citizen were to leave Canada for a business trip, his subsequent bigamous marriage contracted overseas will not make him guilty of the offence.

In India, the offence of bigamy is local as well as extra-territorial because of s. 4 of the Indian Penal Code and s. 188 of the Indian Criminal Procedure Code.

These provisions are-

Section 4 of the Penal Code:

The provision of this Code apply also to any offence committed by

(1) any citizen of India in any place without and beyond India.

(2) Any person on any ship or aircraft registered in India wherever it may be.

Explanation:
In this section the word 'offence' includes every act committed, outside (India) which, if committed in (India) would be punishable under this code.

Illustration:
A, (who is (a citizen of India)) commits a murder in Uganda. He can be tried and convicted of murder in any place in (India) in which he may be found.

s. **188 of the Criminal Procedure Code.**

188. **Offences committed outside India.**

When an offence is committed outside India -

(a) by a citizen of India, whether on the high seas or elsewhere;or

(b) by a person, not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

> Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

Thus, s. 4 of the Penal Code makes all offences under the Code without any exception to be extra-territorial and s. 188 of the CPC confers jurisdiction on the Court within whose locality the accused is found. In other words, s. 188 decides the venue of the trial.

Although we have adopted the Indian Penal Code and the Indian Criminal Procedure Code as our law, we have no equivalent provisions. Our Penal Code does not make all offences under the Code to be extra-territorial. It only makes offences against the State to be extra-territorial; nor does our CPC provide for the venue of the trial of persons who have committed acts abroad which would have been offences, if committed in Malaysia.

In *PP v. Nai Prasit* [1961] 27 MLJ 62 Thomson CJ held that the Sessions Court had no jurisdiction to try an offence of bigamy committed in the Australian State of Victoria. The learned CJ dealt with the case purely from the point of view of jurisdiction. I agree with his view and would like to add that the offence of bigamy not being an extra-territorial offence, there is no way in which the Sessions Court could have the jurisdiction to try the offender who committed it outside Malaysia.

Now in this reference the learned Deputy Public Prosecutor submitted to us that because of the LRA, bigamy has become an extra-territorial offence. He said that since the purpose of the Act is to abolish polygamy and to establish monogamy for all except Muslims, ss. 5, 6 and 7 of the Act make a bigamous marriage irrespective of where it took place, locally or otherwise, to be an offence of bigamy under s. 494 of PC. In other words, s. 5(1) and s. 7 LRA give s. 494 of the PC an extra-territorial effect. With respect, I cannot accept this submission. For ease of reference, I set out below the relevant sections of LRA:

> Section 5(1): Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person.
>
> Section 6(1): Every marriage contracted in contravention of s. 5 shall be void.
>
> Section 7: Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of s. 5 shall be deemed to commit the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of s. 494 of the Penal Code applicable.

There is nothing in any of these sections which renders an offence of bigamy under s. 494 of the PC an extra-territorial offence. Section 5(1) simply says that a person to whom the Act applies, i.e. any non-Muslim has no more capacity to marry during the coverture of the existing marriage, and s. 6 provides a civil consequence of a marriage in contravention of s. 5 in that such marriage is void whilst s. 7 provides a criminal sanction against the marriage in that any person to whom the Act applies, if he contracts a marriage in contravention of s. 5, is deemed to have committed an offence of bigamy. The expression "any law, religion, custom or usage in contravention of s. 5", which expression is found in s. 7 must mean "any law, religion, custom and usage in contravention of s. 5 prevailing in **Malaysia**. (Emphasis is mine). There is no justification to read into these expressions as having the effect of extending the section to an act of marrying outside Malaysia, so as to deem such act by virtue of s. 7 to be an offence under s. 494 of the PC.

We are not concerned here with civil consequence of anyone marrying abroad in contravention of s. 5. Such marriage must necessarily be void under our law, not so much because of s. 5 of LRA having an extra-territorial application, but because under the rules of the conflict of law any civil act done outside the jurisdiction if it is to be enforced in the local Court, will be valid only if it was done in accordance with the local law. The local Court has no power to give legal effect to an act done outside the jurisdiction if such act is contrary to the fundamental public policy of the local law. (See Dicey and Morris: "*The Conflict of Laws*," 9th Edn. p. 70.) In this case, if our Court is required to decide on the validity of the respondent's second marriage, it will certainly hold that such marriage is invalid because it is contrary to s. 5(1) of LRA, though it might be valid under Indian Law.

However, we are only concerned here with the criminal consequences of a bigamous marriage contracted abroad by a person to whom the Act applies. I cannot find any words in the sections of LRA which could carry an implication that such marriage is punishable as an offence of bigamy under s. 494 of the PC. As a matter of commonsense I cannot see how s. 7 which is only a deeming section for the purpose of s. 494 of PC could be held to be wider than the latter section. In my judgment the learned Deputy Public Prosecutor's submission is totally untenable. He was thus forced to submit that it would be a fraud on the LRA which abolishes polygamy amongst non-Muslims, if the Court were to hold that a polygamous marriage contracted abroad by a non-Muslim is not held to be within the Act. That may well be desired as *de lege ferenda,* i.e. the law that ought to be, but until this will have been enacted the Court has no right to extend it to the present law by our interpretative power. There cannot be a fraud on the law if the law is otherwise. I, therefore reject the submission that s. 494 of the PC has been extended extra-territorially by ss. 5 and 7 of the LRA.

Every piece of legislation is presumed to have effect only within the territory of the legislature. If effect is intended to extend beyond the territory the enactment to that effect must be clear and beyond dispute. In English law, and in our law also, presumption against extra-territorial application of a penal statute is well-established. *Regina v. Martin & Ors.* [1956] 2 QB 272 is a case on point. The case centred around the effect of s. 62 of the U.K. Civil Aviation Act 1949 and Reg. 3 of the UK Dangerous Drugs Regulations 1953.

Regulation 3 says:

> A person shall not be in possession of a drug unless he is generally authorized.

Section 62 of the Civil Aviation Act says:

> Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

The question posed to the Court was whether the defendants, who were in possession of raw opium on board a British aircraft flying between Bahrain and Singapore committed an offence under Reg. 3. The prosecution submitted that s. 62 extended the application of Reg. 3 to the act done in a British aircraft irrespective of where the aircraft could be, either in foreign land or over a foreign airspace. The submission was rejected. The Court was of the view that s. 62 does not create an offence and that Reg. 3 does not make an offence for any one to be in possession of the contraband on board the British aircraft while it is flying outside the British airspace. Hence the defendants were acquitted.

Martin's case (*supra*) clearly illustrates the reluctance of the British Court to construe a statute as having an extra-territorial application, unless there is a clear word to that effect.

On the issue of extra-territorial offences, it is useful to see the position both in international law and municipal law (domestic law).

According to an established principle of international law crimes and criminal acts are matters for the State, within whose territory the criminal acts are committed, irrespective of the nationality of the offenders. International law also recognizes that a State has the power to punish its nationals or its permanent residents for criminal acts committed by them outside its territory. But to translate this principle into municipal law (i.e. the domestic law of the State) a clear provision must be made to this effect in its municipal law. We have seen that there is no statute which could be said to have extra-territorially extended s. 494 of the PC.

It seems that the bulk of our criminal law has only a territorial effect, i.e. confined to acts committed within the territories of Malaysia. Only a few offences are made extra-territorial by Parliament. These are:

(1) offences under Chapter VI of the PC i.e. Offences Against the State. These are made applicable to Malaysian citizens and Malaysian permanent residents who committed the act in any place within and beyond the limits of Malaysia by s. 4 of the P.C. and extended by the **Penal Code (Amendment and Extension) Act 1976** (Act A327).

(2) **offences against Official Secrets Act, 1972** (Act 88) and those under **Sedition Act 1948** (Act 15). These are extended extra-territorially by **Extra Territorial Offences Act** 1976 (Act 163); and

(3) offences under the **Prevention of Corruption Act 1961** (Revised-1971). Section 27 of the Act makes corruption offences committed abroad by Malaysian citizens to be offences punishable under the Act and triable by a Malaysian Court having jurisdiction over the place in Malaysia where the offender is found.

Having regards to the modern facilities for travelling, the wealth and affluence of Malaysians which has reached a level which enables not a few but a large number of them to travel overseas every year as business men, tourists, holidaymakers and students, there is no reason why our criminal law should not be made extra-territorial as regards all types of offences committed abroad by our citizens and permanent residents. No country in the world will have any ground to object to this extension, as international law has always recognized that the right of a State to protect and to impose liability on its citizens and others who are under its protection in respect of acts and omissions done by them whilst abroad, i.e. outside its territories. In the *S.S. Lotus* [1927] Series A, No. 10, 2 WCR, p. 20 the Permanent Court of International Justice, i.e. the World Court, established under the league of Nations' Covenant even went so far as to declare that Turkey had the power not only to punish its nationals but also to punish foreigners who committed acts outside her territory against her citizens.

Reverting back to the question which we are required to answer, I am of the view that a bigamous marriage, contracted abroad by a Malaysian citizen or a permanent resident notwithstanding such marriage is in contravention of s. 5(1) of the LRA, is not an offence punishable under s. 494 of the PC. Section 7 of the LRA does not make the offence under s. 494 of the PC an extra-territorial offence. It simply declares that a bigamous marriage in contravention of s. 5 shall be deemed to be an offence of bigamy. Even without this deeming provision, a marriage in contravention of s. 5 will be a marriage "which is void by reason of its taking place during the life of such husband or wife" within the meaning of s. 494 of the

PC and so constituted an offence of bigamy under it. In other words, s. 7 adds nothing new to s. 494 of the PC. It is merely declaratory of the position under the Code. If the offence under s. 494 is not extra-territorial (see *PP v. Nai Prasit)* (*supra*), I cannot see how it could be extra-territorial by reason of s. 5, 6 and 7 of LRA. These sections only deal with situations obtaining in Malaysia. The only effect of the LRA on s. 494 of the PC is that the persons who can be guilty of the offence of bigamy are extended to all Malaysian citizens and those having Malaysian domicile provided they are not Muslims. The Act extends only the personal scope but not its material scope, i.e. the *actus reus.*

My answer to question (a) is, therefore, in the negative.

Question (b)

If the answer to question (a) is in the affirmative, then whether or not in law a magistrate has jurisdiction to try such offence?

Actually since my answer to question (a) is already in the negative, question (b) does not arise any more. However, assuming that the offence of bigamy is extra-territorial, I have no hesitation to hold that the Magistrate, Klang, or even any other Magistrate in the country, has no jurisdiction to try it. There has to be a statutory provision giving jurisdiction to a particular Magistrate's Court usually the Court of the place where the offender is found to try the offence.

As we all know the jurisdiction of a Magistrate's Court is always limited to a particular territorial limit to which the Court is assigned, and where there is no such assignment, the limit is co-extensive with the territorial limit of the respective High Court - see s. 76(2) of the Subordinate Courts Act and s. 9 of the CPC. Under no circumstances could the Magistrate's Court, Klang and for that matter any other Magistrate's Court in this country take cognizance of an offence committed beyond its respective territorial limit. (see *Nai Prasit's* case (*supra*)). Thus, even if an offence is committed in Malaysia, not every Magistrate's Court will have the jurisdiction to try it. Only a particular Magistrate's Court will have it. It must be the Court which has the jurisdiction over the area in which the offence is committed. Now, assuming that a bigamy committed outside Malaysia is an offence punishable under the PC in the absence of any statutory provision conferring jurisdiction on the Court of the area where the offender is found no Magistrate's Court can have jurisdiction to try or to inquire into the offence. There has to be a statutory provision to fix the venue of the trial and thus give jurisdiction to the Court where the trial is to be held.

It is for this reason that the Indian legislature enacts s. 188 of its Criminal Procedure Code. That section is in a sense complementary to s. 4 of the Indian Penal Code. This section makes all offences under the PC to be extra-territorial if committed by Indian nationals and permanent residents and s. 188 fixes the venue of the trial to be the Court at the place where the accused is found. For similar reason s. 62 of the U.K. Civil Aviation Act was enacted, i.e. to fix the venue of the trial. Looking at our law, we have no such equivalent statutory provisions. The Extra-Territorial Offences Act 1976 and the Penal Code (Amendment and Extension) Act 1976 are not extensive enough to make the offence of bigamy under s. 494 of the PC to be extra-territorial offence, nor do they make any provision for the trial of the accused by the Court of the place where he could be found.

Not only has the Magistrate's Court no jurisdiction to try the offence assuming that it is an offence at all - our High Court too has no jurisdiction. Section 22(1) of the Courts of Judicature Act specifies the territorial jurisdiction of the High Court and this is as follows:

22. (1) The High Court shall have jurisdiction to try-

(a) all offences committed-

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ships; or on any aircraft;

(iv) by any person on the high seas where the offence is piracy by the law of nations; and

(b) offences under Chapter VI of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act, 1976, or offences under any other written law the commission of which is certified by the Attorney-General to affect the security of the Federation committed, as the case may be -

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.

There is nothing in this section from which it could be inferred that the High Court can try a Malaysian citizen or permanent resident who whilst already married has contracted a bigamous marriage abroad. The seemingly wide jurisdiction given to the High Court under para. (b) (iii) of sub-section (1) to try a Malaysian citizen or permanent resident in respect of an offence committed in any place without and beyond Malaysia, is limited only to trial of offences under Chapter VI of PC, those under the Extra-Territorial Offences Act, and those certified by the Attorney-General to be security offences.

It would appear therefore that the issue of jurisdiction or lack of it is tied up with the issue whether an act is an offence or not. There is no point in giving a jurisdiction when the relevant act is not an offence. On the other hand it is ridiculous for Parliament to deem an act committed abroad to be an offence without giving jurisdiction to try such offence to any particular Court or Courts. The truth is that as the Court is not given the jurisdiction, the act complained of cannot be an offence.

The answer to question (b) is, therefore, in the negative also.

Abdul Hamid CJ (Malaya) :

The Public Prosecutor applied under s. 27(c) of the Criminal Procedure Code by way of Notice of Motion to the High Court in Kuala Lumpur (No. 8/85) to determine whether the Magistrate's Court, Klang, Selangor has jurisdiction to hear and try Klang Magistrate's Court Arrest Case MA 952/84.

Tan Hock Chuan, a Deputy Public Prosecutor in the Attorney-General's Chambers affirmed on affidavit in support of the application stating that the respondent, Rajappan s/o Chinna Kounder married the complainant Palaniyammal d/o Nall Kounder according to Hindu custom in 1947 in India. In 1954 the respondent, the complainant and their children migrated to Malaysia. Their marriage was subsequently registered with the Registrar of Marriages, Malaysia.

In March 1984 the respondent married one Saraswathi in India at which time the complainant was still living and her marriage to the respondent was still subsisting. In May 1984 the respondent brought Saraswathi to reside at No. 2363, Jalan Dato Setia, off Jalan Raja Barat, Klang, Selangor. In August 1984 pursuant to the complaint by Palaniyammal, the respondent was charged in the Magistrate's Court in Klang for an offence under s. 494 of the Penal Code.

The Deputy Public Prosecutor submitted that the learned Magistrate refused to hear the case on the ground that she had no jurisdiction to do so. Hence the application.

The learned Judge, N.H. Chan J, in his judgment held that the Courts have no jurisdiction to try proceedings for bigamy committed outside the limits of Malaysia. The learned Judge also held that it is not an offence if the second marriage takes place outside Malaysia.

The Public Prosecutor has now referred for our determination the following questions of law:

(a) Whether or not in law a person who is domiciled in Malaysia and marries again during the lifetime of his or her husband or wife at a place outside Malaysia and thereafter returns to Malaysia with the second spouse has committed an offence punishable under s. 494 of the Penal Code (FMS Cap. 45).

(b) If the answer to question (a) is in the affirmative, then whether or not in law a Magistrate's Court has jurisdiction to try such person for an offence punishable under s. 494 of the Penal Code (FMS Cap. 45).

Before I consider the questions, it seems appropriate to observe that the learned Judge was only asked to determine one specific question, namely, whether the Magistrate's Court has jurisdiction to try a case for an offence under s. 494 of the Penal Code where a person already married during the continuance of such marriage purports to contract a second marriage outside Malaysia. The learned Judge was not asked to consider whether or not an offence under s. 494 of the Penal Code is committed. The latter is, strictly, a matter which must be decided at a trial as and when a case is properly before a Court having jurisdiction to try it. For purposes of deciding the question of jurisdiction what is necessary is only to consider the effects of certain sections in the Law Reform (Marriage and Divorce) Act, 1976 (hereafter called the Act), in particular ss. 3, 5 and 7. Section 7 creates an offence and it reads-

> Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of s. 5 shall be deemed to commit the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of s. 494 of the Penal Code applicable.

Section 5 of the Act disables a person who, on the appointed day, i.e. on 1 March 1982 (See P.U.(B) 73/82) is lawfully married under any law, religion, custom or usage to a spouse to contract a valid marriage under any law, religion, custom or usage with any other person during the continuance of such marriage.

Section 3 of the Act specifies the persons in respect of whom the Act shall apply. It expressly provides that the Act shall apply only to all persons in Malaysia and to all persons domiciled but are residents outside Malaysia. The Act would therefore apply to the respondent. And if he purports to contract a second marriage in Malaysia, he is liable to be charged with and tried for an offence under s. 494 of the Penal Code. By purporting to do so he would in effect be acting in contravention of s. 5 of the Act and under s. 7 be deemed to commit the offence of marrying again during the lifetime of his first wife within the meaning of s. 494 of the Penal Code.

As can be seen it is the contracting of the second marriage or the act of purporting to contract a second marriage that constitutes an act of bigamy. Where the act of bigamy takes place within the limits of Malaysia, the problem as to jurisdiction does not arise as it is committed within the Court's territorial jurisdiction. In this regard the Act must be construed, on its true construction, to apply only to an act of bigamy committed within the limits of Malaysia unless there are stated in the Act express words to show that it is the intention of the legislature to make justiciable acts of bigamy committed outside the limits of Malaysia. There seems to be no such express provision in the Act. Since s. 7 of the Act which creates the offence states that it shall be deemed to be one within the meaning of s. 494 of the Penal Code, ss. 3 and 4 of the Penal Code should be considered to determine whether s. 494 is one of those offences which is extra-territorial. Section 3 of the Penal Code states that-

> 3. Any person liable by law to be tried for an offence committed beyond the limits of Malaysia, shall be dealt with according to the provisions of this Code for any act committed beyond Malaysia, in the same manner as if such act had been committed within Malaysia.

Fundamentally the effect of s. 3 is that it provides for punishment of offences committed beyond Malaysia but **by law may be tried** within Malaysia (Emphasis is mine).

In respect of certain offences in the Penal Code s. 4 provides for extension of the Code to certain extra-territorial offences. Section 494 of the Penal Code is, however, not one of the sections covered by s. 4. For this reason, it is my view that no person who commits an act of bigamy extra-territorially can be tried by a Malaysian Court unless there is a law which expressly provides that he can be so tried.

The learned Judge in the Court below, however, felt that-

> As the law stands at the present time, bigamy is not an offence in this country if the second marriage takes place outside Malaysia even though the spouse in the earlier marriage is still living.

This statement was an answer to the question which the learned Judge had posed earlier and that is whether or not it is an offence if the second marriage takes place outside Malaysia. My view is that s. 7 of the Act deems it an offence regardless of where the act of bigamy is committed provided of course he is the person in respect of whom the law applies. Basically the question that emerges is only one of jurisdiction, i.e. which Court can try the offence if it is committed extra territorial? Clearly there has to be a law which confers jurisdiction on our Courts to try the offence.

Perhaps it is useful to consider briefly the case of *The Trial of Earl Russell* [1901] AC 446. In that case it was held that s. 57 extends to a case where the second marriage is celebrated beyond the King's dominions. Section 57 of the English Offences Against the Person Act 1861 expressly makes it an offence where the second marriage takes place in England, Ireland or **elsewhere** (Emphasis is mine). Furthermore it is to be observed, as was quite rightly pointed out by the learned Judge in his judgment, that "section 57 of the Offences Against the Person Act 1861 which deals with bigamy has restricted the application of that section by saying that an offence of bigamy shall not extend to any second marriage contracted outside the United Kingdom by anyone other than a subject of Her Majesty. In other words, a British subject can commit bigamy by contracting a second marriage outside the United Kingdom but a foreigner will not." That fortifies my view that in so far as the law stands in Malaysia there has to be a law which confers jurisdiction on our Courts. Fundamentally there must be express provisions which empower the Courts to hear and try an offence committed extra-territorial.

I now refer to the case of *PP v. Nai Prasit.*[1961] 27 MLJ 62. This case was relied upon by the learned Judge when he held that the Court had no jurisdiction to try proceedings for bigamy outside the limits of Malaysia.

It was a short judgment and for easy reference it is reproduced in full hereunder:

> The accused in this case was convicted in the Sessions Court at Kuala Lumpur for bigamy in contravention of s. 494 of the Penal Code.
>
> The actual act of bigamy, that is to say, the second marriage which was alleged to be void by reason of the wife of the first marriage being still alive, took place in the State of Victoria in the Commonwealth of Australia. In the circumstances the Sessions Court had no jurisdiction to try the case. The territorial jurisdiction of the Sessions Court is set out in s. 9 of the Criminal Procedure Code and except in the case of certain offences committed on the High Seas (that is outside territorial waters) the Court has no jurisdiction to try any offence committed outside the Federation.
>
> In the present case, therefore, the proceedings were a nullity and the conviction of the accused is accordingly set aside.
>
> In order to avoid misunderstanding I should point out that the power of the English Courts to try a bigamy committed outside their territorial jurisdiction (see *Earl Russell's* case) depends entirely on the wording of s. 57 of the Offences Against the Person Act, 1861 which has nothing in common with the wording of s. 494 of the Penal Code.
>
> I would add that in this particular case the Court had no power to take cognisance of the offence wherever it was committed because the complaint which commenced the proceedings was made by a Police Officer and not, as required by s. 131 of the Criminal Procedure Code, by any person aggrieved or by the Public Prosecutor.

As can be seen the Court took into consideration s. 59 of the Subordinate Courts Ordinance 1948 (now Subordinate Courts Act 1948) which provides for territorial jurisdiction of a Sessions Court. Also considered was s. 9 of the Criminal Procedure Code. For the purposes of the present case, however, the relevant section is s. 76 of the Subordinate Courts Act 1948. It provides for territorial jurisdiction of the Magistrate's Court. Subsection (1) of s. 76 provides for the constitution of so many Magistrates' Courts by the Yang di-Pertuan Agong with powers to assign local limits of jurisdiction thereto while sub-section (2) confers jurisdiction on a Magistrate's Court to hear and determine any civil or criminal cause or matter arising within the local limits of jurisdiction assigned to it **subject to the Act or any other written law** (Emphasis is mine).

In my view sub-section (2) makes it clear that the jurisdiction of the Magistrate's Court is limited to a cause or matter arising within the local limits of jurisdiction except where it is expressly provided otherwise by written law.

The proviso to sub-section (2) fortifies the fact that the Magistrate's jurisdiction is limited in that he shall have no jurisdiction even in respect of any cause or matter arising in any State in and for which he is not appointed to be a Magistrate except in the manner and to the extent provided by the Criminal Procedure Code. The relevant section in the Criminal Procedure Code is s. 9(a) which states that :

> 9. Subject to the provisions of this Code every Magistrate shall have cognisance of and power and authority to-
>
> (a) hear, try, determine and dispose of in a summary way prosecutions for offences committed wholly or in part within the local jurisdiction of such Magistrate and cognisable by such Magistrate.

Section 9(a) Criminal Procedure Code only speaks of territorial jurisdiction and cannot, in my view, be construed to apply to any cause or matter extra-territorial. In other words, it merely provides the manner and extent the Magistrate shall have jurisdiction in respect of any cause or matter arising in any State in and for which he is not a Magistrate. The word "any State" can only be referred to any State within the limits of Malaysia not outside Malaysia.

A Magistrate's Court may nonetheless be conferred with jurisdiction to hear and try an offence committed extra-territorial but as stated earlier it shall have to be by law. This is clear from the opening words in sub-section (2) of s. 76 which uses the words "Subject to this Act, or any other written law, ..."

The question therefore is which written law, if any, confers that extra-territorial jurisdiction? Apart from ss. 3 and 4 of the Penal Code which I have referred to earlier, the only other written law which seems relevant for consideration is the Extra-Territorial Offences Act 1976 - an Act to deal with certain offences under written laws committed in any place without and beyond the limits of Malaysia and on the high seas on board any ship or on any aircraft registered in Malaysia or otherwise as if they were committed in Malaysia. This Act too does not cover the Law Reform (Marriage and Divorce) Act 1976. It is not one of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 pursuant to s. 2 of the Act which provides for extra-territorial effect of offences committed outside Malaysia punishable as an offence as if such act or offence were done or committed in Malaysia.

I have also considered s. 22(1)(a) and (b) of the Courts of Judicature Act 1964 but am unable to find anything therein that could be considered to confer jurisdiction on the High Court to try offences under the Law Reform (Marriage and Divorce) Act 1976.

In my judgment, the answer to the questions posed before the Court is that under the present law a Magistrate's Court has no jurisdiction to try a person for an offence punishable under s. 494 of the Penal Code if that offence is committed beyond the limits of Malaysia.

George Seah SCJ:

I have read the judgment of the learned the Lord President and I concur with him that the answer to question (a) be in the negative. As regards question (b) I also concur that the answer should be in the negative for the reasons given by the learned the Lord President.

Hashim Yeop Sani SCJ:

I have read the judgment of the learned Lord President and I agree that the answer to question (a) should be in the negative.

It seems to me the crux of the matter is does s. 7 of the Law reform (Marriage and divorce) Act, 1976 extend the offence of bigamy under s. 494 of the Penal Code to a second marriage contracted outside Malaysia? That could well have been the intention of the drafters of the Act but it is not clearly expressed. There is the definition "marriage with another woman" under s. 2 of the Act to mean marriage of any person being married to any other woman during the life of the former wife "whether the second marriage has taken place within Malaysia or elsewhere". But unfortunately the expression "marriage with another woman" does not seem to appear in s. 7 of the Act at all.

Section 4(1) of the Interpretation Act, 1967 provides for the grammatical variations, cognate expressions, gender and number of any word or expression appearing in a written law. The words "contract another union with any woman" appear however in s. 6(2) of the Law Reform (Marriage and Divorce) Act 1976 but that section deals with the right of succession or

inheritance and not on penal liability. Therefore it cannot be said that the intention (if there was such an intention) of the legislature to cover a second marriage contracted outside Malaysia has been expressed clearly in the statute. An offence simply means an act or omission of such a description as would if committed within Malaysia be punishable under the law of Malaysia. What we have is a clear provision in the Penal code that except for Chapter VI the other offences in the Penal Code are **not** extra-territorial offences.

I can only echo what was expressed very aptly by Lord Simonds in *London and North Eastern Ry. Co. v. Berriman* [1946] AC 313 where he said:

> A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the Court.

In construing penal provisions Lord Simonds referred to the remarks by Lord Esher M.R. in *Tuck & Sons v. Priester* [1887] 19 QBD 629:

> We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.

As regards question (b) since the Magistrate's Court is a creature of a statute its jurisdiction must be determined by the statute. This question has been dealt with extensively in both the judgments of the learned Lord President and the learned Chief Justice with which I agree and have nothing to add.

Eusoffe Abdoolcader SCJ:
I agree with the judgment of the learned Chief Justice Malaya.

Also found at [1986] 1 CLJ 175